COURT OF APPEALS NO. 42959-4-II

PIERCE COUNTY SUPERIOR COURT NO. 93-3-04576-9

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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AMANDA L. BLANK,

Appellant,

and

VERNON RUSSELL BLANK,

Respondent.

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# REPLY BRIEF OF APPELLANT

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In his Opening Brief of Respondent/Cross-Appellant, Russell Blank chose not to respond to any of the errors or issues presented for review raised by Amanda Blank in her Opening Brief of Appellant, thereby implicitly conceding the validity of Amanda's contentions with respect to those errors and issues.

Accordingly, the balance of this brief is devoted to replying to the new issues raised by Russell in his Opening Brief.

*Argument*

**A. The Lower Court Did Not Abuse Its Discretion By Establishing Russell Blank's Monthly Net Income At An Amount Greater Than Permitted By RCW 26.19.071.**

RCW 26.19.071 states:

> (1) **Consideration of All Income.** All income and resources of each parent's household shall be disclosed and considered by the court when the court considers the child support obligation of each parent. Only the income of the parents of the children whose support is at issue shall be calculated for the purpose of calculating the basic support obligation. Income and resources of any other person shall not be included in calculating the basic support obligation.

Russell contends that the court below abused its discretion by including twenty-five percent of Leann's net monthly income, as

income to Russell, to calculate his share of his children's support obligation. Brief of Respondent, pp. 14-15.

In her initial ruling, Judge Martin acknowledged that Leann had no obligation to support her husband's children, but she also recognized that Russell had manipulated their incomes to artificially inflate her income and to lower his own (CP 2041-2042):

> Petitioner's spousal income (Leann Blank) is her salary from the business petitioner owns. Although Leann Blank has no obligation to support Ryan Blank, the Court finds that petitioner has discretion to set salary for himself and his spouse. Leann Blank's salary is higher than petitioner's, even though he owns the company. The Court finds that it is therefore appropriate to consider Leann's salary in determining the amount of petitioner's income. The Court finds that 25% of Leann Blank's 2008 net monthly income should be allocated to Russell Blank as business-related income, in the amount of $1,588.50 per month ..... This Court finds that allocating not more than 25% of Leann's net monthly salary is appropriate, based on evidence that Leann does perform services for the business on a full-time basis and therefore has earned salary.

The court below did not abuse its discretion. Although this is what Judge Martin initially ruled, CP 2041-2042, this was not her final ruling on this issue.

Russell moved the court to reconsider this issue. CP 1580-

1581. And, the court did reconsider.

Once again, Judge Martin recognized that Leann had no legal obligation to support Ryan and did not add her income to Russell's to calculate his income for the purpose of setting his share of the child support obligation. 6/9/2011 RP pp. 4-5.

Instead, Judge Martin recognized that there was an unwarranted and manipulated disparity in their salaries which Russell was able to set by virtue of his sole ownership of Perler Photography, Inc. To remedy that disparity, Judge Martin averaged Leann's and Russell's gross salaries, and then imputed the $569.75 difference to Russell to equalize their salaries in order to more accurately calculate Russell's salary. 6/9/2011 RP pp. 4-5.

Russell also complains that the court did not identify those expenses which it found were personal expenses paid by Perler Photography. This complaint is without merit.

Russell acknowledges (Brief of Respondent, p. 15) that the court below indicated, CP 2042, that the "actual figures are found in paragraph 19 of Amanda Blank's Declaration, dated February 17, 2009 [CP 607-609, 611-697]" and that it then ruled:

> After full review of all available documents and

> Declarations, this Court finds that it is appropriate to designate 50% of the 2008 identified expenses as personal, after first subtracting the $250 per bi-weekly paycheck reimbursed by Leann Blank to the corporation for personal expenses incurred for the benefit of the marital community. Thus, the Court finds that the amount of personal expenses charged to the business for 2008 is $36369.39 plus $1835.16 for a 2008 annualized loan to shareholders, 100% of which is deemed personal. The sum of $19102.28 represents the petitioner's ½ community share of these expenses, for a value of $1591.86 per month business income imputable to Russell Blank. The court further finds that of the $826.21 per month paid by the business for vehicle expense, 20% of this amount is appropriate to attribute to Russell Blank's personal expense in the amount of $165.24 per month. A total of $1757.10 was Therefore added to petitioner's monthly net income, however, no tax deductions were taxed on this additional amount as no personal tax was actually paid by petitioner.

The court below thus identified those expenses which were paid by Perler Photography, Inc. which it found were personal.

### B. The Lower Court Did Not Abuse Its Discretion By Requiring Russell Blank To Pay Child Support For Ryan Blank Beyond June, 2010, Ryan Blank's Anticipated Date Of Graduation From High School.

The Orders of Child Support entered in this case have uniformly provided (CP 456, 468):

> 3.13 TERMINATION OF SUPPORT

> Support shall be paid until the children reach the age of 18 or as long as the children remain enrolled in high school, whichever occurs last, except as otherwise provided below in Paragraph 3.14.

Russell's Petition for Modification of Child Support did not seek to modify this provision. CP 485-503. Nor did he request such a modification when he moved for an order to set child support for Ryan. CP 507, 516-524. Accordingly, the court below lacked legal authority to consider denying basic child support altogether.

Nonetheless, in his brief, Russell bemoans Ryan's academic struggles through high school (without reference to how his chronic health and ADHD issues contributed to those struggles, See Opening Brief, pp. 27-28; CP 402-409, 1317-1319) and contends that Ryan's slow progress relieves him of his support obligations.

In the first instance, unlike post-secondary support, basic child support is not conditioned upon academic achievement, but rather on whether the child remains enrolled in high school.[1] Ryan had been continuously enrolled in the Bethel School District for high

[1] RCW 28A.225.160 contemplates that some children may take longer to complete high school by providing in pertinent part that "it is the policy of the state that the common schools shall be open to the admission of all persons who are five years of age and less than twenty one years residing in that school district."

school since January 27, 2009. CP 1866.

So, in *Kruger v. Kruger,* 37 Wash.App. 329, 330-331, 679 P.2d 961(1984), an Order Modifying Decree of Dissolution was entered which provided for future support, as follows:

> IT IS FURTHER ORDERED that, as set forth in the Decree, support for each child shall continue until age 21 years *so long as* such child is not sooner married, self-supporting, emancipated, and, above age 18, is engaged in a full time program of higher education, absent normal intervals for holidays or summer vacation.

One of the children, Clay, missed school from September 1978 through June 1979 due to a back injury. At other times, he was only a part-time student because of his back problems. Another child, Darby, missed school from January through March 1981 because of lack of funding. In calculating the amount of unpaid child support, the trial court included the time during which Clay and Darby were enrolled in school after age 18. The father argued that the phrase "so long as" must be read as words of limitation, meaning "until such time," not "during such time."

In rejecting the father's interpretation, the Court in *Kruger v. Kruger,* 37 Wash.App. at 331-332 held:

> The purpose of providing for support beyond age 18 clearly was to encourage and aid the children in pursuing higher education and to decrease any financial disadvantage they might suffer in this regard as a result of their parents' divorce. *See Childers v. Childers,* 89 Wash.2d 592, 598, 575 P.2d 201 (1978). The more restrictive reading of the clause urged by the husband would not further this purpose.

Russell's assertion that Ryan was somehow no longer "dependent and became emancipated" because of "his refusal to take affirmative steps to complete his high school education, at age 18", Brief of Respondent, p. 18, is without legal or factual support.

As the Washington Supreme Court held in *Childers v. Childers,* 89 Wash.2d 592, 598, 575 P.2d 201(1978):

> A dependent is, in our view and as used in this context, one who looks to another for support and maintenance, one who is in fact dependent, one who relies on another for the reasonable necessities of life. Dependency is a question of fact to be determined from all surrounding circumstances, or as the legislature put it: "all relevant factors". RCW 26.09.100. Age is but one factor. Other factors would include the child's needs, prospects, desires, aptitudes, abilities, and disabilities, and the parents' level of education, standard of living, and current and future resources. Also to be considered is the amount and type of support (i. e., the advantages, educational and otherwise) that the child would have been afforded if his

> parents had stayed together. See *Puckett v. Puckett*, 76 Wash.2d 703, 458 P.2d 556 (1969).

Just as the children in *Childers v. Childers,* 89 Wash.2d at 598-599, Adam and Ryan both continued to live at home, were not self-sustaining, and relied upon both parents for support, maintenance, and the reasonable necessities of life.

In support of her ruling, Judge Martin found (6/15/11 RP 7):

> The spring term he's enrolled. He's taking classes, and we do not know yet the results, but it is anticipated that he will receive high school credit, and his plan, as I understand it, is to continue with online courses this summer and work towards graduation, which at this point he has 20.825 credits; he needs 22.5 to graduate, along with a culminating project. Both his testimony and that of his mother anticipates that he will complete his high school education by the first month or so of the fall term. And, indeed, the Exhibits 23 and 25 that I reviewed reflect an intent to receive a high school degree and the sufficiency of credits by the fall of 2011.[2]

Similarly, the father's obligation to provide health insurance and to share the cost of extraordinary health care expenses does

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[2] See also, CP 2182-2184, 2189-2193. Russell's contention that "as noted by the trial court, Ryan Blank's needs as a student, were no-existent [sic], after he turned 18, since he was not actively pursuing a high school diploma. CP 2120," Brief of Respondent, p. 23, misstates what the lower court actually stated.

not depend upon the child's academic achievement, so long as the child remains enrolled in school.

RCW 26.19.080(2) provides in pertinent part that "Monthly health care costs *shall* be shared by the parents in the same proportion as the basic child support obligation." [emphasis added].

Yet, Russell complains that the lower court did not exercise its discretion to determine the necessity and reasonableness of Ryan's uninsured extraordinary health care expenses. But RCW 26.19.080 (4) provides that such a determination is permissive, not mandatory. Russell never requested the court below to exercise such discretion, or challenged the reasonableness or necessity of any particular charge. Nor did he present any evidence that he was unable to pay his share of such uninsured extraordinary health care expenses, in light of his total support obligations for Adam and Ryan, based on the court's finding that his net income was $8,195 per month.[3]

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[3] In his eighth Assignment of Error, Russell makes a similar complaint about being ordered to pay uninsured health care expenses for Adam, but does not argue this "error" in his brief. Where an assignment of error is not argued, it is regarded as waived or abandoned and will not be considered. *Wigton v. Gordon*, 3 Wash.App. 648, 650, 477 P.2d 32 (1970).

As a general rule, issues not raised in the lower court will not be reviewed on appeal, *King County v. Washington State Boundary Review Bd. for King County*, 122 Wash.2d 648, 670-671, 860 P.2d 1024 (1993), and neither should this one.

### C. The Lower Court Did Not Abuse Its Discretion By Requiring Russell Blank To Contribute To Ryan Blank's Post-Secondary Support.

The Orders of Child Support entered in this case have uniformly provided (CP 456, 468):

> 3.14 POST SECONDARY EDUCATIONAL SUPPORT
>
> The parents shall pay for the post secondary educational support of the children. Post secondary support provisions will be decided by agreement or by the court.

Russell's Petition for Modification of Child Support did not seek to modify this provision. CP 485-503. Nor did he request such a modification when he moved for an order to set child support for Ryan. CP 507, 516-524. As a result, the court below lacked any legal authority to consider *whether* to order support for postsecondary educational expenses.

Accordingly, Russell's complaint that the court below "failed to address the level of education of the parties, the standard of

living of both parties, and the current and future resources of Russell Blank to accommodate ongoing educational support for an adult, who had no ability or motivation to complete his high school education or any post-secondary educational program" (Brief of Respondent, p. 23) is without merit, since those are factors the court below would consider only "when considering whether [and for how long] to order support for postsecondary educational expenses". RCW 26.19.090(2).

Russell's complaint that the court below should not have awarded any post-secondary support is thus without merit.

Russell also contends that the lower court erred by failing "to consider the Child Support Schedule, prior to establishing Russell Blank's obligations for the support of his two adult sons." (Brief of Respondent, p. 25). Russell complains that "the standard calculation of his child support obligation, utilizing the Child Support Schedule, based upon the Court's income determinations (which Russell Blank disputes), was $1,199.53", but the "Court's final order resulted in Russell Blank having a child support obligation for Ryan Blank and post-secondary educational support obligations of Ryan Blank and Adam Blank of $1,756.88, per month, over the course of

thirty-seven months." (Brief of Respondent, pp. 24-25).

Although it is not entirely clear how Russell arrived at this calculation, it appears that he took the $946 figure from Column B for a Two Children Family under the Economic Table for the Monthly Basic Support Obligation Per Child, doubled it, and then multiplied the total by his 63.4% share of the parties' combined net monthly income. His entire argument is based on this fallacy.

But, basic child support continues only until a child reaches 18 years old or remains enrolled in high school high school, whichever happens last.

Post-secondary support is not calculated from the Economic Table for the Monthly Basic Support Obligation Per Child which provides a lump sum payment each month. Instead, the court determines what each parent's share of post-secondary expenses should be. Post-secondary expenses may include anything sufficiently related to the child's postsecondary educational needs, including health care, with no monetary cap on a parent's share of this support obligation. *In re Marriage of Kelly*, 85 Wash.App. 785, 791, 795, 934 P.2d 1218 (1997), *review denied*, 133 Wn.2d 1014 (1997).

Moreover, the court below did address the Washington State Child Support Schedule for advisory purposes. But, as the Court explained in *In re Marriage of Daubert and Johnson* , 124 Wash.App. 483, 500-505, 99 P.3d 401 (2004), *reversed on other grounds, McCausland v. McCausland*, 159 Wash.2d 607, 152 P.3d 1013 (2007), notwithstanding the provision in RCW 26.19.090(1) stating that the child support schedule shall be advisory and not mandatory for postsecondary educational support, postsecondary educational child support must be apportioned between parents according to their respective net incomes in the same manner as is basic child support. This is exactly what the lower court did here.

Russell's complaint that the court below "neglected to address the actual impact of the Court's order on Russell Blank, specifically related to his current and future resources", is likewise without merit.

Russell's "current resources" means current as of August 1, 2008, the effective date of the modification, and the date upon which the Court determined Russell's monthly net income was $8,195.08. When his wife's income is taken into account, as it must, his "current resources" as of August 1, 2008 means his

household had a net income in excess of $16,000 per month,[4] more than sufficient to meet his child support obligations.

In this case, with the exceptions (i.e. errors) raised in Amanda's Opening Brief, the court below entered an order providing for Ryan's post secondary support consistent with Paragraph 3.14 of the parties' Orders of Child Support and RCW 26.19.090. CP 2027, 2062-2067, 2121-2123.

### D. The Lower Court Did Not Abuse Its Discretion By Requiring Russell Blank To Contribute To Adam Blank's Post-Secondary Support.

For each of the reasons set forth in the preceding section, the court below lacked the legal authority to deny post-secondary support for Adam altogether. Moreover, the lower court did not err by failing to consider the Child Support Schedule before establishing Russell's obligations for Adam's post-secondary support.

Russell's contention that "[e]ven if post-secondary educational support was to be ordered, the support obligation should have been suspended from January, 2009, through the

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[4] The court below had no competent evidence of what Russell's or his household's income was for any time after August 1, 2008.

entry of the Court's order, since Adam was never in good academic standing as defined by the institution and was never a full time student" (Brief of Respondent, p. 31), is again without merit.

Even though Russell complains about Adam's academic struggles, RCW 26.19.090 (3) states:

> The child must enroll in an accredited academic Or vocational school, must be actively pursuing a course of study commensurate with the child's vocational goals, and *must be in good academic standing as defined by the institution*. The court-ordered postsecondary educational support shall be automatically suspended during the period or periods the child fails to comply with these conditions.

Pierce College defines good academic standing as:

> Any student who earns 5 or more credits for each quarter in which they are enrolled, and maintains a 2.0 or better *cumulative* grade point average will be considered in "good academic standing" at Pierce College (excluding ABE, GED, ESL, HSC).

CP 395. According to Adam's Pierce College transcript, Adam's cumulative grade point average was 2.15 as of June 30, 2011(CP 1873).[5]

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[5] The lower court did suspend Russell's post-secondary support obligation for those quarters in which Adam was not in "good academic standing", Opening Brief, p. 25 fn.14, and relieved him of any obligation to pay a second time for classes Adam was required

According to Nancy Houck, Director of Student Success at Pierce College, as of July 6, 2011(CP 1879):

> Adam has maintained a 2.0 or better cumulative grade point average beginning Spring Quarter 2009 and has been in good academic standing with the college since Spring Quarter 2009.

Nothing more is required.

In particular, there is no requirement that Adam must complete twelve (12) credits or more per term, as Russell contends, before he is considered a full-time student at Pierce College. Pierce College requires that a student must earn only 5 or more credits for each quarter in which s/he is enrolled. See also, *In re Marriage of Jarvis*, 58 Wash.App. 342, 346-347, 792 P.2d 1259 (1990)( "The court's conclusion Julie was required to 'successfully complete' a full-time course load to retain payments was an unwarranted, retroactive modification of the decree under RCW 26.09.170. It was also error to conclude Julie was not entitled to support during those months.").

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to repeat. However, the lower court did err by failing to order Russell to pay his full-share of Adam's post secondary support at the University of Idaho. Contrary to his assertions (Brief of Respondent, p. 9), Russell did not pay his share "based upon in-state tuition." Adam and Amanda did apply for financial aid, CP 2186-2187, and Adam did receive a $3,000 scholarship, CP 1587.

### E. The Lower Court Did Not Abuse Its Discretion By Failing To Award Reasonable Attorney Fees To Russell Blank, Based On Need And Ability To Pay, Pursuant To RCW 26.09.140.

In determining whether to award attorney fees, pursuant to RCW 26.09.140, the court must consider the financial resources of both parties, and balance the needs of the requesting party against the other party's ability to pay. *In re Marriage of Nelson,* 62 Wash. App. 515, 521, 814 P.2d 1208 (1991).

Russell asserts that the lower court's finding that he did not have the ability to pay the requested fees, not did Amanda have the need, CP 2044, is supported by substantial evidence, as outlined by his declaration of April 30, 2009, CP 957-969. (Brief of Respondent, p. 34).

But, in this declaration, Russell claimed that his net income was only $3,600 per month, CP 957, as well as numerous other unsupported and unsupportable assertions of impending financial doom, as he has done in every proceeding concerning his support obligations, and which the court below did not adopt.

In fact, the lower court found that Russell's net monthly

income is $8,195.08. [6] CP 2024, 2035. Leann makes an equivalent sum. Yet, according to Russell's Financial Declaration, the total monthly expenses for his entire marital community is only 7,810.77, CP 508-515, while his marital community's net monthly income exceeds $16,000.

Given these findings, Russell did not establish that he was unable to pay his own attorney fees, or that he had any need for Amanda to contribute to those fees.[7]

To the contrary, as more fully discussed in the Opening Brief of Appellant, this same evidence established that Russell has the ability to pay his own attorney fees as well as those incurred by Amanda. The lower court's finding that Russell did not have the ability to pay the fees requested by Amanda, CP 1560, is not supported by substantial evidence.

In addition, Amanda established that she does have the "need" for Russell to pay the attorney fees she has incurred, and

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[6] As more fully discussed in the Opening Brief Of Appellant, Amanda maintains that Russell's net monthly income is substantially higher than the amount found by the court below.

[7] For that matter, Russell failed to provide any evidence of what attorney fees he had incurred.

that she lacks the ability to pay her own attorney fees. The court found that Amanda's net monthly income is $4,738.12. CP 2035. Her Financial Declaration shows that her total monthly expenses are $6,092.50. CP 703-709. The lower court's finding that Amanda does not have the need to have Russell to pay the fees she requested, CP 1560, is thus not supported by substantial evidence.

For each of these reasons, the lower court should be affirmed for denying an award of reasonable attorney fees to Russell, and reversed for denying an award of reasonable attorney fees to Amanda, pursuant to RCW 26.09.140.

Moreover, while Russell refers to the fact that the court below denied Amanda's request for attorney fees based upon his intransigence in concealing and falsely reporting his income, he does not address Amanda's arguments as to why the lower court's conclusion that he was not intransigent is not supported by either the facts or the law, and thus constitutes an abuse of the court's discretion.

This is a case of a father who has, since the inception of these proceedings, fraudulently used his solely-owned business to pay his marital community's personal expenses, and thereby to

conceal and misrepresent his actual income by thousands of dollars each month to avoid his obligations to support his children.

The time and attorney fees which the children's mother, Amanda, has thus been compelled to incur to unravel Russell's financial misconduct, for yet a third time, to enable the court to more accurately calculate his actual income has been immense, and would not have been incurred, but for his intransigence.

Indeed, Russell does not deny that he is collaterally estopped to re-litigate the issue of whether his use of his solely owned business, Perler Photography, Inc., to conceal its payments of his marital community's personal expenses, and his failure to disclose and accurately report that income, constitutes fraud and intransigence, since this identical issue has been previously adjudicated twice before in this case.

The Honorable Sergio Armijo previously found that this identical conduct constituted "fraudulent misrepresentation", CP 429. The Honorable Lisa Worswick found that this conduct constituted "intransigence in fraudulently reporting his income". CP 470. Both judges awarded Amanda attorney fees on this basis.

Russell is thus collaterally estopped to re-litigate whether

such conduct does or does not constitute "intransigence in fraudulently reporting his income" and supports an award of attorney fees now. *Christensen v. Grant County Hosp. Dist. No. 1,* 152 Wash.2d 299, 306-307, 96 P.3d 957 (2004); *In re Marriage of Mudgett*, 41 Wash.App. 337, 342-343, 704 P.2d 169 (1985).

The court below abused its discretion by disregarding these prior adjudications that this conduct constitutes intransigence supporting an award of attorney fees.[8]

The precedent this Court will establish here is important. If a parent who lies about his or her income in a child support proceeding must bear the innocent parent's expense of exposing that deceit, parents will be deterred from lying. On the other hand, if the innocent parent must bear that expense, innocent parents will be deterred from undertaking the expense necessary to expose the other parent's fraud, and the court will thus be precluded from being able to accurately calculate the deceitful parent's income.

The choice is clear.

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[8] The Appellant reincorporates by reference each of the arguments set forth in her Opening Brief as to why the law, facts and public policy mandate an award of reasonable attorney fees to her in this case.

### F. Russell Blank Should Not Be Awarded Attorney Fees On Appeal, Pursuant To RAP 18.1.

Upon a request for fees and costs under RCW 26.09.140, courts will consider "the parties' relative ability to pay" and "the arguable merit of the issues raised on appeal." *In re Marriage of Muhammad*, 153 Wash.2d 795, 807, 108 P.3d 779 (2005).

For each of the foregoing reasons, Russell is not entitled to an award of attorney fees on appeal, pursuant to RCW 26.09.140. He has not produced competent evidence of either his lack of ability to pay his own attorney fees, his need for Amanda to pay his attorney fees, or Amanda's ability to pay his attorney fees.[9] In addition, the issues Russell raise on appeal lack arguable merit.

## CONCLUSION

Since Russell chose not to contest the errors raised by Amanda in her Opening Brief, he has implicitly conceded the merits of her arguments. The relief she requests should be granted.

On the other hand, none of the issues raised by Russell in his brief withstand scrutiny. Each is without merit. Accordingly, the

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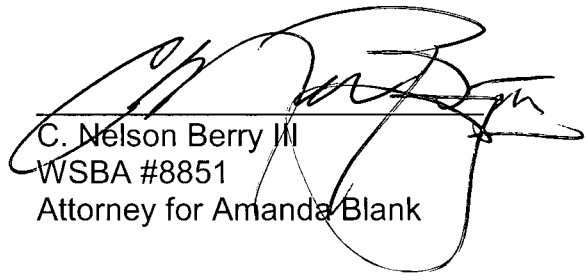
[9] Given Russell's history throughout these proceedings, any Financial Declaration he may submit in support of such an award should be greeted with a high degree of skepticism.

relief Russell requests in his Opening Brief should be denied.

Respectfully submitted this 10th day of January, 2013.



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**CERTIFICATE OF SERVICE**

I certify that on the 10th day of January, 2013, I mailed a true and accurate copy of the foregoing Reply Brief of Appellant, by first class mail, postage prepaid, to:

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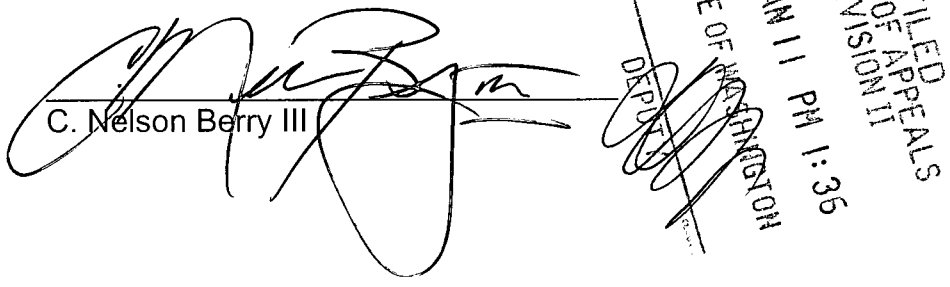

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